

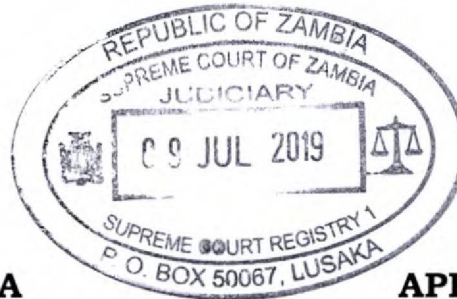
SELECTED JUDGMENT NO. 20/2019

P.628

IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 113/2006

HOLDEN AT KABWE

(Civil Jurisdiction)



BETWEEN:

JOHN CHIPAWA SAKULANDA

APPELLANT

AND

RAMJI BHIMJI MENAND KHUTI

1ST RESPONDENT

ATTORNEY GENERAL

2ND RESPONDENT

CORAM: Musonda, Ag. Deputy Chief Justice, Hamaundu, Wood, Kabuka and Mutuna, JJS, on 8th May, 2018, 2nd April, 2019 and 9th July, 2019.

FOR THE APPELLANT: N/A

FOR THE 1ST RESPONDENT: Mr. J. Sangwa, State Counsel, Messrs. Simeza, Sangwa & Associates.

FOR THE 2ND RESPONDENT: Major F. Chidakwa and Ms. D. Mwewa, State Advocates, Attorney General's Chambers.

JUDGMENT

KABUKA, JS, delivered the Judgment of the Court.

Cases referred to:

1. The Attorney-General Ministry of Works and Supply and Rose Makano v Joseph Emanuel Frazer and Peggy Sikumba Frazer, SCZ Judgment No. 14 of 2001.
2. Attorney General v Steven Luguru, SCZ Judgment No. 20 of 2001.
3. Vinod Kumar Pande v Nickson Mtine, Appeal No. 31 of 2014.
4. Wilson Masauso v Avondale Housing Project Limited (1982) ZR 172.
5. Frank Malichupa & Others v Tanzania-Zambia Railways Authority (2008) ZR 112.
6. Beatrice Muimui v Sylvia Chuundu, Appeal No. 50 of 2000.
7. Judith Mporokoso v Kerries Mumbi, SCZ No.19 of 2014.
8. Charles Kajimanga (Hon. Judge) v Marmetus Chilemya, Appeal No. 50 of 2014.

Legislation and Other Works referred to:

1. The Lands Act, Cap. 184, SS.3 (3) (a), (b), of the Laws of Zambia.
2. The Land (Conversion of Titles) Act, 1975.
3. Halsbury's Laws of England, 4th Edition, Vol. 17 page 39 paragraph 53.
4. Sir Russel, A.K.C: Legislative Drafting and Forms, 4th Edition, 1939, London, Butterworth & Company Publishers, at page 100.
5. P. St. J. Langan: Maxwell on Interpretation of Statutes, 12th Edition, London, Sweet & Maxwell at page 234.
6. Handbook on Civil Service Home Ownership Scheme clauses 1.2 (b), 2.1 (e).
7. Cabinet Circular No. 12 of 1996.

Introduction

1. The appellant had appealed a judgment of the High Court dated 22nd May, 2001. On 22nd October, 2004 he filed a notice

discontinuing the appeal which brought his appeal to an end. As the 1st respondent had also cross- appealed the same judgment, we proceeded to hear the cross-appeal which was defended by the 2nd respondent, and this is now our judgment on the cross-appeal.

2. The cross-appeal is directed at the finding made by the High Court, that although as a 'permanent resident' the 1st respondent qualified to own land in Zambia, he was ineligible to purchase house No. 1 Saise, Road, Rhodes Park, Lusaka ("the house") under the Government House Empowerment Scheme, as he had failed to provide proof of the President's consent allowing him to do so.
3. What the cross- appeal questions is whether, in order to be entitled to purchase a government *institutional* house, pursuant to clause 1.2 (b) of the Government Circular on the Implementation of the Civil Service Home Ownership Scheme, as read with the eligibility clause 2.1 (e); a non-Zambian in occupation of the house, who qualifies to own land in Zambia as a 'permanent resident' pursuant to **section 3, subsection (3) (a) of the Lands Act**, must further satisfy

the requirements of **subsection (3) (c)** of the same provision, by obtaining the President's prior consent in writing.

Background

4. The history of the cross-appeal is that the 1st respondent who is a British national, born in Kenya, was in 1979 granted an entry permit into Zambia and employed in the civil service as a Civil/Water Engineer in the Ministry of Energy and Water Development ("the Ministry").
5. On 17th September, 1994 the Ministry accommodated the 1st respondent in its *institutional* house known as house No.1, Saise Road, Rhodes Park, Lusaka ("the house"). When he had been in occupation of the house for about two years, the Government of the Republic of Zambia introduced a Home Ownership Scheme, by which it was to offer for sale, some of its *pool* houses to civil servants occupying them.
6. As he was interested in the *institutional* house he was occupying, by letter dated 15th October, 1996 the 1st respondent applied to the Permanent Secretary in the Ministry, to consider offering it to him.

7. The Permanent Secretary instead referred the application to the Committee on the Sale of Government *Pool* Houses ("the Committee") which rejected it on grounds that, the 1st respondent was not a Zambian citizen and was thus, ineligible to purchase the house.
8. Aggrieved by that decision, the 1st respondent appealed to the President of the Republic of Zambia. Through a letter from the Permanent Secretary, the appellant was informed that his appeal had succeeded and the Ministry had since withdrawn the house from the sale list submitted to the Committee.
9. Premised on the notification of the withdrawal, the Committee in turn, wrote to the Registrar of Lands, directing him to cancel the offer that had been made to the appellant to purchase the house and refund him the money he had paid for the purchase price. It however, later transpired that, the directive to cancel the offer notwithstanding, beneficial interest in the house was transferred into the appellant's name.

10. The appellant obtained his Certificate of Title, following which he went to request for vacant possession of the house from the 1st respondent. When that approach failed, he commenced proceedings in the High Court, seeking an order for vacant possession.
11. The Ministry decided to join those proceedings through the office of the Attorney General, as 2nd respondent and challenged the legality of the sale of the house to the appellant on the basis that, the appellant was neither a civil servant nor in occupation of the house. The Ministry further questioned how the appellant was issued with a Certificate of Title, when the original, which was in the name of the former registered owner ZCBC was still in its custody.
12. Further irregularities and inconsistencies surrounding the sale were highlighted as follows:
 - (a) the house was sold at a cost of half its original value;
 - (b) the appellant, who was ineligible, was offered the house;
 - (c) the appellant was issued with a Certificate of Title on 8th February, 1999 when the record shows that the Committee had earlier, on 26th November, 1998 issued a directive to the

Registrar of Lands to cancel the offer to the appellant and refund him the monies paid towards the purchase of the house;

- (d) the appellant was issued a new Certificate of Title when the original had not been cancelled and was still in the Ministry's possession.

Consideration of the matter by the trial court and decision

13. The learned High Court judge considered the 1st respondent's claim of entitlement to purchase the house against the backdrop of all the affidavit evidence before her, as earlier highlighted. She also considered arguments advanced by counsel, that as the holder of an entry permit, the 1st respondent qualified under **section 3 (3) (a) of the Lands Act**, to purchase real property in Zambia, including the property in question. And, that the Committee's decision not to allocate the house to the 1st respondent on the basis that he was not Zambian, should be nullified.

14. The learned trial judge accepted the uncontested evidence that: the 1st respondent was retired from the civil service, he had served the Ministry for a period in excess of 18 years, and was also in occupation of the house. Her conclusion however, was that, his non-Zambian status and the failure to

produce in evidence the presidential consent under **section 3 (3) (c)** he claimed he had obtained, prevented him from being eligible to purchase the house in issue.

Grounds of the cross-appeal to this Court

15. It is against that judgment that the 1st respondent has anchored his cross-appeal, advancing three grounds, which are couched in the following terms:

1. the judge in the court below misdirected herself on a point of law in holding that the 1st respondent was not entitled to buy the institutional house in which he was a sitting tenant;
2. the judge in the court below erred on a point of law in holding that the 1st respondent did not qualify under section 3 of the Lands Act to purchase the institutional house in which he was a sitting tenant;
3. the judge in the court below erred on a point of fact in holding that the 1st respondent's appeal to the President to purchase the institutional house in which he was a sitting tenant was not successful.

The 1st respondent's arguments on his cross-appeal

16. When the cross-appeal first came up for hearing on 8th May, 2018 we were a panel of three Judges. State Counsel Mr. Sangwa, for the 1st respondent applied for, and we granted

him leave, to file his heads of argument out of time. Upon considering the main issue raised in the appeal, the panel was thereafter reconstituted to five Judges and the appeal was re-heard on 2nd April, 2019. At the re-hearing, Counsel on both sides indicated they would rely on their written heads of argument earlier filed on record which they supplemented briefly, orally.

17. The arguments of the 1st respondent focused on ground two and faulted the trial court below for finding that, a non-Zambian civil servant who is a 'permanent resident' under **section 3 (3) (a)** and also a sitting tenant, could only purchase a government house he is occupying under the Civil Service House Empowerment Scheme, if he first obtained the President's consent in writing, pursuant to **section 3 (3) (c) of the Lands Act, Cap. 184**. State Counsel argued that, this reasoning was based on a mis-interpretation by this Court, of the provisions of **section 3 of the Lands Act**. That this Court should vacate its previous decisions on the issue, as they were given *per incuriam*.

18. The submission in that regard was that, **subsections 3 (3) (a) and 3 (3) (c) of the Lands Act** are disjunctive and the cases decided on this point before the amendment of the Constitution which came into force on 5th January, 2016 such as, **The Attorney-General, Ministry of Works and Supply and Rose Makano v Joseph Emanuel Frazer and Peggy Sikumba Frazer¹**; **The Attorney General v Steven Luguru²**; with the latest being **Vinod Kumar Pande v Nickson Mtine³**; did not sufficiently interrogate the relationship between the various provisions of **section 3**.
19. Quoting extensively from the **Vinod Kumar³** case, the learned State Counsel made the point that, **section 3 of the Lands Act** is not one provision, but is made up of several subsections which are independent provisions. That these subsections provide for various instances, numbering according to State Counsel, ten in total, where non-Zambians can acquire land from the President. Referring to the **Luguru²** and **Frazer¹** cases in particular, State Counsel contended that, this Court is yet to explain the premise for holding that a non-Zambian civil servant, who is a permanent resident,

needs to acquire consent from the President in order to acquire land in Zambia.

20. Counsel proceeded to discuss the background to the various statutes relating to land in Zambia in great detail to underscore the point that, **section 3 of the Lands Act** permits the President to alienate land to persons falling under **section 3 (2)** who are Zambians; or those under **section 3 (3)** who are non-Zambians.

21. The enactment of the **Land (Conversion of Titles) Act, 1975** was also referred to, as one that was primarily aimed at Conversion of Titles to land and vested all State land in Zambia in the President. That the said enactment thereby brought to an end, the holding of land in perpetuity by individuals who had obtained interest before it came into force. State Counsel further noted that, by **section 13** of the same Act, any sale of land without prior consent of the President was prohibited.

22. State Counsel contended that, the Act did not address the issue of acquisition of vacant land by non-Zambians, which

is what prompted the enactment of **section 13A**. He argued that, under **section 13A**, no land could be sold or leased to non-Zambians, except as provided under **section 13A (2)** which identified 5 categories only, of non-Zambians, to whom land could be alienated, leased or sold.

23. It was State Counsel's further argument that, the **Land (Conversion of Titles) Act** was in turn, repealed and replaced by the **Lands Act, 1995** which maintained the provision vesting State land in Zambia in the President, to be held in perpetuity on behalf of Zambians to whom it can be alienated under **section 3 (2)**. That limited alienation of land to non-Zambians, is also provided for in **section 3 (3)**. Counsel referred us to these sections which read as follows:

"3.(2) Subject to subsection (4) and to any other law, the President may alienate land vested in him to any Zambian.

(3) Subject to any other provisions and procedures relating to alienation of land, the President may alienate land to a non-Zambian under the following circumstances:

(a) where the non-Zambian is a permanent resident in the Republic of Zambia;

(b) where the non-Zambian is an investor within the meaning of the Investment Act or any other law relating to the promotion of investment in Zambia;

- (c) **where the non-Zambian has obtained the President's consent in writing under his hand;**
- (d) **where the non-Zambian is a company** registered under the Companies Act, and less than twenty-five per centum of the issued shares are owned by non-Zambians;
- (e) **where the non-Zambian is a statutory corporation** created by an Act of Parliament;
- (f) **where the non-Zambian is a co-operative society** registered under the Co-operative Societies Act and less than twenty-five per centum of the members are non-Zambians;
- (g) **where the non-Zambian is a body registered under the Land (Perpetual Succession) Act and is a non-profit making,** charitable, religious, educational or philanthropic organisation or institution which is registered and is approved by the Minister for the purposes of this section;
- (h) **where the interest or right in question arises out of a lease,** sub-lease, or under-lease, for a period not exceeding five years, or a tenancy agreement;
- (i) **where the interest or right in land is being inherited upon death or** is being transferred under a right of survivorship or by operation of law;
- (j) **where the non-Zambian is a Commercial Bank** registered under the Companies Act and the Banking and Financial Services Act; or
- (k) **where the non-Zambian is granted a concession or right under the National Parks and Wildlife Act.** (boldfacing for emphasis only)"

24. The argument in that regard was that, contrary to what was suggested in the **Vinod Kumar**³ case, **section 3 (3) of the**

Lands Act, as reproduced above, does not stipulate the conditions which must be satisfied before land can be alienated to a non-Zambian.

25. State Counsel contended that, this Court has previously held, but erroneous so, that being a permanent resident is not sufficient qualification for a foreigner to acquire land or an interest in land in Zambia, as the non-Zambian in addition, must obtain written Presidential consent.
26. It was submitted that, in so holding this Court was wrong. That, this is not the import of **section 3 (3) of the Lands Act**, as the section does not purport to set out the conditions under which alienation can be done. According to State Counsel, what the section does, is to provide for categories of non-Zambians to whom the President can alienate land.
27. In particular, State Counsel observed that the two provisions called in question, being **subsection 3 (3) (a)** and **3 (3) (c)**, have been the most misconstrued as they were read '*conjunctively*' instead of '*disjunctively*', which in State Counsel's words 'is contrary to the intended objectives, as

was for the Scheme to only benefit Zambian civil servants, there would have been no need to refer to **section 3 (2) of the Lands Act**, in the regulations, as Zambian civil servants who were sitting tenants would have acquired houses as a matter of right.

31. Similarly, non-Zambian civil servants who were also sitting tenants would have been required to satisfy the circumstances under **section 3 (3) (a) or (c)**, by either '*being a permanent resident*' or '*obtaining the President's consent in writing under his hand*'. This distinction was said to have been lost in the High Court, in arriving at its decision, that the 1st respondent did not comply with **section 3 (3) (c) of the Lands Act**.

32. State Counsel proceeded by further arguing that, the trial court ignored both facts and the law when it acknowledged that the 1st respondent qualified to purchase property in Zambia but based its decision to disqualify him, on the lack of consent from the President, when this was not a requirement under the **Handbook on Civil Service Home**

Ownership Scheme. That, the court below also ignored relevant evidence given by the 1st respondent, of great importance, that the rejection of his application to purchase the house was on the basis that he was a non-Zambian.

33. State Counsel re-iterated his submission that, **Cabinet Circular No. 12 of 1996** did not discriminate against non-Zambians, particularly those with a valid entry permit which is also known as a 'permanent resident' permit. And, that **Cabinet Circular No. 12 of 1996** and the **Handbook on Civil Service Home Ownership Scheme** constituted the contractual documents between the Government of the Republic of Zambia and its civil servants. That the responsibility of the court in the circumstances, was to merely give effect to these conditions and not to rewrite them.

The 2nd respondent's arguments in response

34. In answer to those submissions counsel for the 2nd respondent relied on their written heads of argument and submissions filed into court on 30th April, 2018. Grounds one and two were addressed together, the submission being

that, the learned trial judge was on firm ground when she found the 1st respondent did not provide evidence of Presidential consent for him to buy the house. In the event, that his application was properly rejected by the Committee, on the basis that he was a non-Zambian.

35. Counsel further argued that, as a retired civil servant occupying the house in question by virtue of his employment with the Ministry, the 1st respondent fell under **Clause 2.2 (a) (iii)** of the Handbook. According to counsel, this clause, identifies Zambian civil servants who are eligible to purchase government *pool* houses, as: (i) only those who were 'sitting tenants'; and (ii), 'if they also qualify to own land under the provisions of **section 3 (2) or 3 (3) of the Lands Act**'.
36. His submission was that, the 1st respondent was just a civil servant in occupation of the house at the time, with only an entry permit. By reason of being a non-Zambian, he was required to obtain a written consent under the President's hand, sanctioning any alienation of the government *pool* house to him.

37. Counsel for the 2nd respondent submitted that, grounds one and two of the appeal had no merit to the extent that they fault the trial judge for having found the 1st respondent was not entitled to buy the house in issue as he did not meet the qualifications.
38. On ground three, the arguments by learned counsel were to the effect that, it was the 1st respondent's position that he had successfully appealed to the President against a decision of the Committee not to recommend him to be offered the house for sale. The 1st respondent's said position was premised on a letter dated 25th April, 1999 from the Permanent Secretary in the Ministry.
39. The submission on the point was to the effect that, contrary to that position, the Lands Act is clear that there must be consent given under the President's own hand. In support of the submission, counsel relied on the same cases assailed by his counterpart, State Counsel representing the 1st respondent, as having been decided *per incuriam*.

40. The case of **Wilson Masauso v Avondale Housing Project Limited**⁴ was called in aid of the further submission that, this was not a proper case to reverse the findings of fact made by the trial court. That the learned judge was on firm ground in holding that there was no proof of a letter under the hand of the President, authorising alienating of land to the 1st respondent, which could have qualified him to purchase the house in issue.
41. In augmenting his written submissions, orally, learned counsel stressed the point that, the 1st respondent was giving the impression that the only criteria used by the trial judge in discounting his eligibility was the fact that he was non-Zambian when the trial court had referred to other reasons as well. One such reason was that the property in question had since been withdrawn from the list of houses that were on offer to be sold.
42. His submission was that, the trial judge considered all the evidence and found no *malafides* disclosed in the withdrawal of the house from the sale list. That the 1st respondent is

merely seeking to force the State to offer him the house in issue for sale, when it does not want to do so. We were accordingly urged to uphold the withdrawal on the ground that, the property was an *institutional* house and that, there is no law which compels a person to sell his house to a 'sitting tenant'. The case of **Frank Malichupa & Others v Tanzania-Zambia Railways Authority**⁵, was cited as authority for the submission.

43. Regarding **section 3 (3) of the Lands Act**, Counsel argued that, this section was brought into question on account of **clause 2.1.(e) of the Handbook** which provides for eligibility of civil servants to purchase Government houses. His submission was that, he did not agree with the sweeping contentions made on behalf of the 1st respondent, that **section 3 (3)** does not have any conditions to be met.
44. In conclusion, counsel nonetheless, conceded that in order to own land in Zambia, a non-Zambian did not have to fulfil all the conditions set out under **section 3 (3)** such as meeting the requirements of both **subsections (a) and (c)**.

45. In a brief reply, State Counsel on behalf of the 1st respondent reiterated that, a non-Zambian can still own land in Zambia even when he has not obtained written consent from the President. He emphasised that, care should also be taken when reading cases related to sale of Government houses as the sale of Government '*pool*' houses was not on the same terms as the sale of Government '*institutional*' houses.
46. State Counsel concluded by submitting that, the State could not claim it cannot by law be compelled to act, by invoking **section 16** of the **State Proceedings Act** in this case; as **Circular No. 12 of 1996** and the **Handbook on Civil Service Home Ownership**, formed a binding contract between Government and its employees and the 1st respondent had been one such employee.

Consideration of the matter by this Court and decision

47. We have considered the grounds of appeal, arguments and submissions, previous decisions of this Court as well as the statutory law to which we were referred by counsel for the parties, against the evidence on record. We find that grounds

one and two of the appeal raise interrelated issues, with ground two being the anchor ground.

48. The issue raised in ground two is the construction of **section 3 of the Lands Act**. The question being, whether or not, the subsections to this provision are conjunctive as construed in previous decisions of this Court?
49. In ground one, the argument is to the effect that, when the section is properly construed disjunctively, as opposed to conjunctively, the 1st respondent not only qualified to own land in Zambia but was also entitled to purchase the institutional house in question.
50. Ground three, maintains the 1st respondent's claim, that his appeal to the President was successful.
51. We propose to start with considering the issue in ground two of the appeal which will also take care of the issue in ground one, before proceeding to consider ground three.
52. In his submissions on ground two, Learned State Counsel for the 1st respondent, Mr. Sangwa, delved in great detail on the

proper import of **section 3 (3) of the Lands Act**. We shall not repeat the arguments which we set out earlier in paragraphs 16-32 of this judgment, save to take note of the point raised: that the various qualifications listed under **section 3 (3)** ought to be read and taken '*disjunctively*' and not '*conjunctively*'; as previously done by this Court in past cases concerning sale of Government *pool* houses to non-Zambians.

53. The past decisions of this Court include the sale of Government Pool houses; the sale of Council houses; and the sale of Parastatal houses. All these had different criteria that had to be met, but we consistently underscored the point that, in the house empowerment cases the question was always whether or not the claimant had satisfied the particular criteria attendant to the sale of the house in issue, pursuant to the Government House Empowerment Policy.

54. In the early case of **Beatrice Muimui v Sylvia Chuundu**⁵, this Court made the following observation:

"We do not subscribe to the argument that being a sitting tenant is the sole criteria in purchasing of a Government or quasi- government house in the current policy of empowering employees of Government."

55. A year later, the issue arose again in the cases of **The Attorney General, Ministry of Works and Supply and Rose Makano v Joseph Emmanuel Frazer and Peggy Sikumba Frazer¹**; and **Attorney General v Steven Luguru²**. These cases involved foreign nationals who were working in the Government civil service and were accommodated in Government houses by virtue of their said employment.

56. Pursuant to Clause 2.1 (b) of the Government Circular on implementation of the Civil Service Home Ownership Scheme, they applied to purchase the houses they were occupying. Their applications were however, rejected mainly for two reasons: (i) that they were non-Zambians; and (ii) they needed to obtain the President's consent in writing, authorising such sale to them. In the former case of **Frazer¹** we opined that:

"This case, among many others that have come before us in relation to the sale of Government Pool Houses as well as sale of parastatal houses, is a clear example of unfairness and injustice in the sale of Government Pool Houses which the authorities concerned must rectify. **The guidelines and the law are very clear. Non-Zambians are entitled to buy land in Zambia and to purchase Government Pool Houses on**

certain conditions, among them the obtaining of **Presidential Consent**. The first appellant in this case met all the conditions. All that remained was to obtain Presidential Consent, which on the facts, he would have obtained but the authorities decided to overlook this. Despite the outcome of this appeal, the authorities are urged to re-examine the issue.” (boldfacing and underlining for emphasis supplied)

57. That decision was delivered on 13th December, 2001. Five days later, the same rationale was substantially employed in the **Luguru**² case delivered on 18th December, 2001 in which considering the policy of the Government as stated in the **Cabinet Circular No. 12 of 1996** which identified the target group of intended beneficiaries as **Zambian nationals**, we held that:

“It was a Government condition of service to sell the houses to **Zambian civil servants who are sitting tenants**. The respondent, a **Tanzanian national**, did not qualify to purchase the Government house....**We consider that the reference to section 3 of the Lands Act in the Circular was intended to cover those non-Zambian civil servants who were established residents and who had complied with that section. There was no evidence here that the respondent had obtained the relevant Presidential consent under section 3.**”

58. Four years later, the issue arose again in the case of **Judith Mporokoso v Kerries Mumbi**⁶, where it was argued that, as the appellant was a government employee working in the Ministry of Education and a sitting tenant in the ZCCM house in issue, she was entitled to purchase it.
59. In dealing with the issue on appeal, this Court considered that being a sitting tenant and an employee of the government, at the time of implementation of the House Ownership Empowerment Scheme did not make the appellant *eligible* to purchase a ZCCM house. That the appellant, in addition, needed to be an employee of ZCCM or its subsidiary.
60. Another two years thereafter, the same issue had to be dealt with in the case of **Charles Kajimanga (Hon. Judge) v Marmetus Chilemya**⁷. The appellant had been in occupation of the house in issue by virtue of his employment with the Zambia Co-operatives Federation (ZCF) as Legal Counsel/Board Secretary. He was offered the house by ZCF at the time that it had taken charge of the affairs of the National Marketing Board (NAMBOARD) which was faced

with liquidity problems. Later, in order to settle terminal benefits of its former employees, the house occupied by the appellant was offered to the respondent in part-payment of his benefits.

61. The amount was duly deducted from his said benefits following which he was issued with a Certificate of Title. He successfully took a claim to the High Court seeking a declaration that he was the lawful owner. On appeal by the appellant to this Court, we upheld the trial judge noting that:

“Although it is not in dispute that the appellant was an employee of ZCF and has been an employee of the Judiciary since 6th August, 2002, he had never been an employee of NAMBOARD, the institution whose houses were sold to its former employees as settlement of their terminal benefits.”

62. Lastly, in **Vinod Kumar**³, which is one of the latest decisions of this court having been delivered on 23rd June, 2017. The appellant, an Indian national who came to Zambia in 1972 as a teacher, worked in various schools until he finally retired in October, 2000. During the period of service, he was accommodated in a Government Flat No. Lus/2046/Katete/11 Lusaka.

63. When the government introduced the policy of selling Government Pool Houses to sitting tenants, the appellant applied to buy the flat he was living in but did not receive any response from the committee on the sale of Government Pool Houses. Unknown to him, the flat was in fact offered to the respondent. She paid the purchase price and obtained a Certificate of Title after which she commenced proceedings in the High Court seeking vacant possession of the flat from the appellant.
64. The High Court granted the respondent the order sought, reasoning that the appellant had not purchased the flat as he did not obtain the required consent of the President in writing, pursuant to **section 3 of the Lands Act**. On appeal to this Court by the appellant, we affirmed the decision in the **Luguru**² case, noting that Government Circulars on the sale of pool houses were intended to empower only Zambian civil servants to purchase pool houses. We went on to hold as follows:

“There is no doubt whatsoever that, as a permanent resident, the appellant was entitled to own land and, therefore, that he was eligible to purchase the Government Pool House. **Such eligibility**

however, is conditional on satisfaction of two vital prerequisites: firstly, that he was a sitting tenant; and secondly, that he obtained the consent in writing of the President in accordance with the requirements of Section 3 (3) of the Lands Act."(boldfacing for emphasis only)

64. The provisions of **section (3) (3)** of the **Lands Act** in all the previous decisions referred to in paragraphs 53-63 above, amongst many others, are the same ones in issue in this appeal, to the extent that they relate to alienation of land to non-Zambians. With regard to construction of the section, we have taken note of the legal statement made by the learned author **Sir Russel, A.K.C. in his book Legislative Drafting and Forms, 4th Edition, 1939, London, Butterworth & Company Publishers, at page 100**, that:

"where it is desirable to show that all the provisions under the main provision are to be taken together, the word **"and"** should be added after each provision; if they are to be taken separately, then the word **"or"** should be used after each provision."

65. While we accept that **section 3**, earlier reproduced in paragraph 22, has neither the word **'and'** nor **'or'** after each subsection, with the latter only appearing in the last, but one paragraph, as correctly pointed out by State Counsel. The

position of learned author, **P. St. J. Langan, Maxwell on Interpretation of Statutes, 12th Edition, London, Sweet & Maxwell at page 234** on the point, is further that:

“In ordinary usage, “**and**” is conjunctive and “**or**” disjunctive.”

66. A reading of **section 3 (3)** shows it first refers to “*circumstances*” in which the President is empowered to alienate land to non-Zambians and thereafter, proceeds to list each such ‘*circumstance*,’ in eleven separately numbered subsections. In our view, that context indeed invites the reading of the word “*or*” after each subsection which provides for a particular identified “*circumstance*”/category.

67. We are thus satisfied, that the provisions of **section 3 (3) of the Lands Act**, are independent, stand-alone provisions consisting of eleven categories of non-Zambians who qualify to own real property in Zambia and must be read ‘*disjunctively*’. This, in essence, was the submission made by State Counsel for the 1st respondent and we commend the learned State advocate for magnanimously, conceding that position.

68. What this means is that, under **subsection 3 (3) (a)**, in particular, being a '*permanent resident*' is sufficient qualification for a foreigner to acquire land or an interest in land in Zambia. Accordingly, the 1st respondent who had an entry permit, was pursuant to **section 14 of the Immigration and Deportation Act**, a '*permanent resident*.' That status qualified him to own land in Zambia, under **subsection 3 (3) (a) of the Lands Act**.
69. Proceeding from that premise, we have further considered the uncontroverted evidence on record. This evidence shows that the house in issue was an *institutional* house. It was bought by the Ministry from ZCBC, is located within an ordinary residential area and not ancillary to the operations of the institution.
70. Further still, that the Ministry's own letter under the Hand of its permanent secretary of 25th April, 1998, to the Committee on the sale of Government Pool Houses confirmed the house was available for sale. And, it is also clear, that the intention of the Ministry was to facilitate the generation of a letter of offer to the 1st respondent.

71. When the committee rejected to act on that recommendation on the basis that the 1st respondent was a non-Zambian, the Ministry reacted by immediately withdrawing the house from the sale list. The 1st respondent was thereafter allowed to remain in occupation from 26th November, 1998 to the date of re-hearing the appeal on 5th April, 2019 as confirmed by State Counsel, to this Court. The reaction of persistently rising to the defence of the 1st respondent, in our view, totally negates the otherwise spirited attempt by the State to put up a convincing argument, that the State was unwilling to sell house No. 1 Saise Road, Rhodes Park to the 1st respondent.
72. It is against that background evidence, that we will now consider **clauses 1.2 (b) and 2.1 (e)**, which are the parts of the Government Circular on the implementation of the Civil Service Home Ownership Scheme, relevant to determining the issues in this appeal. These clauses read as follows:

1. 2 (b) Institutional houses to be sold

Institutional houses purchased or constructed by an institution using Government/Donor funds and are located within ordinary residential areas but not ancillary to the operations of the institution concerned will be sold.

2.1 (e) Eligibility

In the process of identifying civil servants who are bona fide sitting tenants, the following criteria shall be used:-

A civil servant who qualifies to own land under the provisions of section 3 (2) and (3) of the Lands Act, No. 29 of 1995.

Conclusion

73. What can be distilled from the above clauses on the qualification for an applicant to be entitled to be offered a government house for purchase is that: he/she has to be (i) a civil servant; (ii) sitting tenant; and (iii) qualified to own land in Zambia.
74. Using that criteria, the 1st respondent who was a civil servant, sitting tenant in the house and, as a '*permanent resident*' qualified to own land in Zambia under **section 3 (3) (a) of the Lands Act**, had most certainly satisfied the requirements to be offered the house in question for purchase. As the house was an *institutional* house, we take judicial notice of the practice that, the permanent secretary in the Ministry reserves the right to offer the house to him directly and there was thus, no need to refer his application to the Committee

on the sale of government *pool* houses. The other alternative, that remains available to the 1st respondent is to obtain Presidential consent under **section 3 (3) (a)** of the same Act.

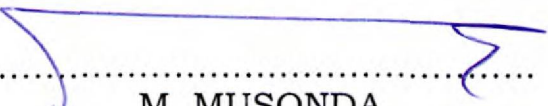
75. Grounds one and two of the cross-appeal contending that the provisions of **section 3 (3) of the Lands Act** are disjunctive, and that, the 1st respondent was entitled to be offered the institution house in which he was a sitting tenant, succeed for those reasons.

76. Having thus, accepted, that the provisions of **section 3 of the Lands Act** must be read disjunctively, our past decisions on the issue, were to the extent that we said a non- Zambian 'permanent resident' who qualifies to own land in Zambia pursuant to **section 3 (3) (a)** must, in addition, further satisfy the requirements of **section 3 (3) (c)** by obtaining the president's written consent under his own hand, were a misdirection. **Section 3 (3) (a)** is a stand alone provision which wholly qualifies a permanent resident in Zambia to own land.


77. In concluding with ground three, we have already held that the provisions of **section 3 (3) of the Lands Act** are independent of each other. To that end and if the 1st respondent sought to rely on **section 3 (3)(c) of the Lands Act**, alone, he should have produced actual presidential written consent before the trial court, as proof that his appeal had indeed succeeded. This would have independently and wholly so, qualified him as a non-Zambian, to be offered the house in question under that subsection.
78. We are, in that regard, satisfied that the trial judge below was on firm ground, when she discounted the letter from the permanent secretary as mere hearsay evidence, which could not be relied upon to satisfy the requirement of **section 3 (3) (c) of the Lands Act**.
79. The legal position is that, for a non-Zambian to qualify to own land pursuant to **section (3) (3) (c) of the Lands Act**, he must first obtain written consent under the hand of the President and such authority cannot be delegated.
- Ground three of the cross-appeal fails for that reason.

80. The 1st respondent having substantially succeeded on his cross-appeal, costs will follow the event and are to be taxed in default of agreement.


Appeal succeeds.




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M. MUSONDA
AG. DEPUTY CHIEF JUSTICE



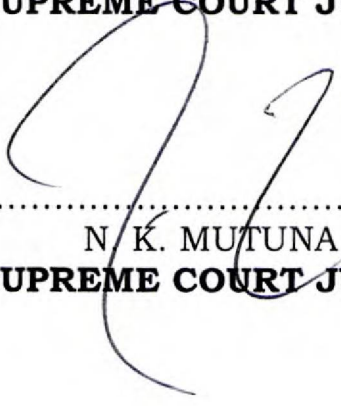
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E. M. HAMAUNDU
SUPREME COURT JUDGE



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A. M. WOOD
SUPREME COURT JUDGE



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J. K. KABUKA
SUPREME COURT JUDGE



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N. K. MUTUNA
SUPREME COURT JUDGE